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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY FRANK JAIME, Defendant and Appellant.	G035522 (Super. Ct. No. 03NF0331) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Jeffrey J. Stuetz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Janelle Marie Boustany, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Anthony Frank Jaime appeals the judgment sending him to prison for 16 years[1] after a jury convicted him of robbery. (See Pen. Code, § 211.)[2] Subsequent to the trial, the court found he had three prior "strike" convictions, three prior serious felony convictions, and two prior prison terms. (See §§ 667, subds. (a), (d)-(e), 667.5, subd. (b).) Jaime contends on appeal that the trial court failed to instruct sua sponte as to the lesser included offense of attempted robbery and as to the definition of the force that could be used to prevent a thief from escaping. He also finds error in the court's failure to instruct sua sponte on the unanimity instruction (see CALJIC No. 17.01). Finally, he argues the evidence was insufficient to sustain the findings by the court that his prior burglary convictions were serious felonies and "strikes." We affirm.

FACTS

Overton Lewis, a security officer for K-Mart, observed Jaime and a woman acting suspiciously while they were in an aisle of the store displaying health and beauty products. Lewis saw Jaime pick up three boxes of Sucret throat lozenges and three boxes of Tylenol Cold medicine and place them underneath his waistband. Jaime and the woman then passed through the cash register area and walk through the exit doors of the store. Lewis confronted Jaime immediately outside the door and asked him about the items he had in his pants. Jaime told Lewis to leave him alone, but stepped back inside the doorway as he said it. Suddenly, he ran at Lewis and smashed him in the temple with his fist. The two struggled and wrestled until another employee, Nathan Camping, came to Lewis's aid, and the two were able to subdue Jaime. Jaime kept screaming, "I'm cool; I'm cool!"

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[1] The trial court granted a partial motion to dismiss in furtherance of justice under section 1385, striking two of the three prior "strike" convictions, one of the prior serious felony convictions and both of the prior prison terms. The court then ordered Jaime to prison for the midterm of three years, doubled under the Three Strikes law, with consecutive, five-year terms for both of the prior serious felonies. Thus, the total aggregate term was 16 years.

[2] All further section references are to the Penal Code unless otherwise stated.

Upon returning to the store's interior, Lewis and Jaime walked back to the health and beauty aisle because Jaime maintained he had returned anything he had "pocketed." Lewis told him he didn't believe him. Instead, Lewis reached into the waistband, and although he couldn't feel anything at the waist level, he felt items inside the pants themselves. He ordered Jaime to accompany him to the security office where he intended to retrieve those items. As they walked together, however, Jaime suddenly bolted, requiring Lewis to run after him and tackle him from behind. Inside Jaime's pants leg near the ankle, Lewis located five boxes of Sucrets, three boxes of Tylenol Gelcaps and two tubes of Baby Oragel, items totaling about $44.

Jaime chose not to testify. The defense called Rochelle Manuel, another K-Mart cashier, who testified that she did not see Jaime sock Lewis; she saw them wrestling and fighting but couldn't tell how it started as "everything just happened too fast."

DISCUSSION

Instructional Error

1. Lesser Included Offense

Jaime faced a single charge of robbery, based on the incident at K-Mart in which he struggled with Lewis after having pocketed merchandise for which he never paid. Attempted robbery is a lesser included offense of robbery (see *People v. Bonner* (2000) 80 Cal.App.4th 759, 765), a crime which the jury never learned it could consider as an alternative to the actual charge. According to Jaime, the trial court had the sua sponte duty to inform the jury of all lesser included offenses; thus, it was irrelevant that the defense specifically objected to any instruction regarding attempted robbery as a lesser offense.

The defense did not merely acquiesce to the trial court's instructions; the defense actually objected to the court's giving the instruction of the attempted robbery as a lesser offense. The trial court even inquired of the defense as to its reasons—whether tactical or strategic—for the objection, to which counsel answered, "It's just for the

reason I don't think it applies." The court then ruled that, under *People v. Pham* (1993) 15 Cal.App.4th 61, once the items were taken, whatever the crime was, it was past the point of an attempt.

"When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so." (*People v. Webster* (1991) 54 Cal.3d 411, 443.) However, "[w]e need not decide this question because even if there was error, defendant is barred from asserting it under the invited error doctrine. . . ." (*People v. Cooper* (1991) 53 Cal.3d 771, 827.) Jaime responds that the invited error doctrine should be discounted in this case because counsel did not object on *tactical* grounds, but on mistaken legal grounds. Moreover, he concludes that anything counsel might have said would have been ignored by the court because it had already concluded that the instruction was inappropriate under *People v Pham, supra,* 15 Cal.App.4th 61.

We disagree. The court had inquired of *both* parties whether the instruction for attempted robbery as a lesser included offense was requested. First, the defense stated it was not requesting the instruction, and the court inquired as to why. The defense stated "I don't think it's applicable." The prosecutor then responded that he was not requesting such an instruction, either. In response to the *prosecutor's* statement, the court stated "I think *People v. Pham* addresses that. I don't think attempted robbery or grand theft is applicable. And . . . if there is a theft, it seems to be a petty theft. . . . Are you objecting to attempted robbery and grand theft as lesser includeds?" (*Sic.*) When the defense answered yes to this question, the court then asked if it was for tactical or strategic reasons. The defense reiterated its opinion that it was irrelevant. The court then agreed.

The court never said it would *not* give the instruction, irrespective of defense counsel's objection to it. The court gave the defense repeated opportunities to reconsider its initial position. The court gave the instruction that petty theft was a lesser

included offense to the robbery, and the discussion clearly indicates the court's willingness to include the other potential lesser offenses. It was due to the defense's repeated and adamant objection that it was *not* given.

It is exactly this situation which the invited error doctrine is designed to remedy. In *Cooper*, the defense counsel's objection to the lesser included offense instruction was for the tactical reason that he did not want a compromise verdict from the jury. However, he phrased it in terms almost identical to those presented by the defense in the case before us: He did not believe there was evidence which would justify a finding of the lesser offense. (*People v. Cooper, supra*, 53 Cal.3d at pp. 826-827.) A similar conclusion could be drawn as to the defense's reasons for objecting here, even though counsel in the case before us refrained from describing it as a tactical reason. It was, however, quite a "conscious [and] deliberate" choice. (*People v. Collins* (1992) 10 Cal.App.4th 690, 694-695 [if no "conscious, deliberate *or* tactical reason was stated for concurring in the instructions, there was no invited error . . . of the instructional error claims." (Emphasis added.)].) "Defendant may not now complain that the court did exactly what he insisted upon." (*People v. Cooper, supra*, 53 Cal.3d at p. 827.)

2. Failure to Instruct on Excessive Force and Self-Defense

Jaime likewise argues the trial court erred in its instructional duties by giving the prosecution's special instruction regarding the use of force in retention of merchandise. He characterizes this instruction was misleading as it lacked a sua sponte definition as to what constitutes excessive force and the right to assert self-defense to such force.

The special instruction declared "An owner, employee or an agent of a retail establishment may use a reasonable amount of nondeadly force necessary to: [¶] 1. Protect himself [] from a person detained for theft; or [¶] 2. Prevent escape of the person detained; or [¶] 3. Prevent the loss of tangible or intangible property. [¶] Penal Code § 490.5 (f) (1) & (2)" The instruction was a correct statement of the law as it is

statutorily established in section 490.5, subdivision (f)(2). Nonetheless, Jaime contends the trial court had the sua sponte duty to clarify that instruction by further defining what constitutes a reasonable amount of force *and* that self-defense can be asserted against any force greater than that which is deemed reasonable.

The trial court need not clarify or amplify any correct instruction sua sponte. The complaining party must craft such a pinpoint instruction and request it of the trial court. (See *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1439; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1017.) Jaime responds that his counsel raised the issue in the discussion about the instructions. Counsel expressed he had "mixed feelings" about the prosecution's special instruction, and feared it would confuse the jury. Counsel then requested "a self-defense-type instruction . . . . I can argue [the amount of force used] was unreasonable. But, if it's unreasonable force, then . . . the issue becomes: Can Mr. Jaime use force to protect himself?"

Assuming these statements constitute the requisite crafting and presentation of a pinpoint instruction, Jaime failed to present authority for his position at the time of the request. He fails to provide such authority to us as well, relying instead on whether the evidence supported his interpretation of the law. He proposes we follow the example of the reviewing court in *People v. Lee* (2005) 131 Cal.App.4th 1413, which reversed a conviction for unlawful discharge of a firearm because the court refused to give drafted instructions on self-defense. In that case, however, the issue was not one of self-defense against the statutorily authorized use of force by a retailer to stop a thief. Rather, it was the novel assertion of self-defense against attacking dogs. In acknowledging there was no authority for relying on the defense in such circumstances, the appellate court nonetheless held the instructions should have been given because "[c]onceptually, there is nothing in the elements of self-defense, as set forth in the rejected instructions [] that requires the threat to come from a human agency. . . . The focus is on the nature of the threat, rather than its source. It serves no public policy, and is neither logical nor fair, to

deprive appellant of the defense of self-defense because the threat of imminent harm came from a dog and not from a person. The use of force in defense of oneself should be legitimate, whether or not the source of the threat is a human being. . . ." (*Id.* at p. 1427.)

In the case before us, not only did counsel fail to provide legal authority for his position, but there *is* sound public policy against the assertion of force in situations of shoplifting patrons confronted by retailers. It is codified in section 490.5, and it grants the right to such retailers to use reasonable force to stop and detain thieves, and to prevent them from taking property belonging to another. Had Jaime desired a definition of the amount of force permitted, he could have drafted such a clarification. He did not. On all of these grounds, we reject the attack on the absence of self-defense instructions in this case.

3. Unanimity Instruction

Jaime contends the jury could have convicted him of the robbery *without* each juror agreeing as to which act constituted the crime. In other words, he argues the trial court was required to inform the jury it had to be unanimous as to which act constituted the crime. (See CALJIC No. 17.01; cf. *People v. Nesler* (1997) 16 Cal.4th 561, 590.)

The evidence which Jaime argues is ambiguous is that of either Jaime's punching Lewis in the head to escape *or* his wrestling and fighting with Lewis to escape. However, the common exception to the unanimity instruction requirement is when—like here—the defendant is charged with the commission of the crime by "a continuous course of conduct." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 851; see *People v. Zavala* (2005) 130 Cal.App.4th 758, 768; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296.) The actions by Jaime supporting the charge of using force to effectuate the taking of the items was a continuous series of movements. That series of movements included the punch in the head, the wrestling outside the door and the fighting inside the store en

route to the security office. (See generally *People v. Estes* (1983) 147 Cal.App.3d 23, 28-29.)[3] Thus, no unanimity instruction was needed.

Sufficiency of Evidence

Jaime characterizes the evidence at the court trial on his prior convictions to be legally insufficient to support the court's finding he had three prior "strikes" and three prior serious felonies. (See §§ 667, subds. (d)-(e), 667.5, subd. (a).) Specifically, he contends two prior convictions, alleged as *both* serious felonies *and* prior "strikes," were insufficiently shown to be burglaries of *occupied* residences as distinct from any other type of burglary, which does not meet the statutory requirements of prior serious or violent felonies.[4]

Residential burglary constitutes first degree burglary; all other burglaries are of the second degree. (§ 460, subds. (a)-(b).) The abstract of judgment for the two counts of residential burglary depicted both burglary convictions as of the second degree. However, the court had proof through the certified copies of the prior guilty pleas and their accompanying complaints that the two convictions were for *residential* burglaries. In the face of this ambiguity, the court reviewed all the documents, considered the discrepancy and found, beyond a reasonable doubt, that both burglaries were of residences and that the abstract of judgment was in error.

Abstracts of judgment are not the documents of the conviction; they are merely digests of official information. In the event of a conflict, the court's actual pronouncement of judgment governs. (See *People v. Mitchell* (2001) 26 Cal.4th 181,

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[3] *Estes* held that the "crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety. It is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape. The crime is not divisible into a series of separate acts. . . . The events constituting the crime of robbery, although they may extend over large distances and take some time to complete, are linked by a single-mindedness of purpose. [Citation.] Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*People v. Estes, supra,* 147 Cal.App.3d at p. 28.)

[4] The trial court found that all three of the prior convictions were true. It then dismissed "in furtherance of justice" one of the two burglary convictions for the sole purpose of sentencing.

185.) The court may look to the entire record of the conviction for proof of a prior conviction allegation. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 345.)

Jaime contends the burden was on the prosecution to prove the abstract of judgment was *wrong* before it could rely on the other documents of the conviction to show it was a residential burglary for which Jaime stood convicted. Moreover, he avers, there is authority to support that the sentencing court granted him leniency and *actually or implicitly* reduced the charge to burglary of the second degree. (See § 1192.)[5]

To review a conviction for the sufficiency of evidence, "we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] 'The court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We '"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509, original italics.) It is *not* our duty to determine whether *we* would have made the same finding. The court had the entire record of convictions, and from them, determined the record was clear the burglaries were residential in nature. Credible

[5] Section 1192 states that upon "a plea of guilty, or upon conviction by the court without a jury, of a crime or attempted crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree. Upon the failure of the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

evidence supports that finding, although there was a conflict in the documents. Nonetheless, we must uphold the findings if supported by solid evidence.

The judgment sending Jaime to prison for 16 years is affirmed.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.